

1 THE HONORABLE RICHARD A. JONES
2
3
4
5
6
7
8
9
10
11
12
13

14
15 UNITED STATES DISTRICT COURT
16 WESTERN DISTRICT OF WASHINGTON
17 AT SEATTLE
18
19
20
21
22
23
24
25
26
27
28
29
30
31

32 JOHN D. KNECHT,
33
34 Plaintiff,
35
36 v.
37
38 FIDELITY NATIONAL TITLE
39 INSURANCE COMPANY, MORTGAGE
40 ELECTRONIC REGISTRATION
41 SYSTEMS INC., DEUTSCHE BANK
42 NATIONAL TRUST CO. AS TRUSTEE
43 FOR GSR MORTGAGE LOAN TRUST
44 2006-0A1, MORTGAGE PASS-
45 THROUGH CERTIFICATES, SERIES
46 2006-0A1, AMERICAN HOME
47 MORTGAGE SERVICING INC.,
48
49 Defendants.
50
51

52 No. 2:12-cv-1575 RAJ
53
54 DEFENDANTS' REPLY IN SUPPORT OF
55 MOTION TO DISMISS
56
57 Noted for Consideration:
58 October 26, 2012
59
60
61

62 Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"); Deutsche Bank
63 National Trust Co. as Trustee for GSR Mortgage Loan Trust 2006-0A1, Mortgage Pass-Through
64 Certificates, Series 2006-0A1 ("Deutsche Bank"); and American Home Mortgage Servicing, Inc.
65 ("AHMSI"), collectively "Moving Defendants," submit this reply to Plaintiff's Response to
66 Defendants' Motion to Dismiss [Dkt 14] (herein after "Plaintiff's Response").
67
68

69 A. **The Complaint, as Reasonably Interpreted by Moving Defendants, Fails to State a**
70 **Claim for Relief.**

71 The theme of Plaintiff's Response is that "defendants just don't get it." The Response
72 refers to the Motion to Dismiss as setting up a "straw man" argument; "mistak[ing] Plaintiff's
73
74

75 DEFENDANTS' REPLY IN SUPPORT OF
76 MOTION TO DISMISS
77 (NO. 2:12-CV-1575 RAJ) - 1
78 71045-0121/LEGAL24995208.1

79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
10010
10011
10012
10013
10014
10015
10016
10017
10018
10019
10020
10021
10022
10023
10024
10025
10026
10027
10028
10029
10030
10031
10032
10033
10034
10035
10036
10037
10038
10039
10040
10041
10042
10043
10044
10045
10046
10047
10048
10049
10050
10051
10052
10053
10054
10055
10056
10057
10058
10059
10060
10061
10062
10063
10064
10065
10066
10067
10068
10069
10070
10071
10072
10073
10074
10075
10076
10077
10078
10079
10080
10081
10082
10083
10084
10085
10086
10087
10088
10089
10090
10091
10092
10093
10094
10095
10096
10097
10098
10099
100100
100101
100102
100103
100104
100105
100106
100107
100108
100109
100110
100111
100112
100113
100114
100115
100116
100117
100118
100119
100120
100121
100122
100123
100124
100125
100126
100127
100128
100129
100130
100131
100132
100133
100134
100135
100136
100137
100138
100139
100140
100141
100142
100143
100144
100145
100146
100147
100148
100149
100150
100151
100152
100153
100154
100155
100156
100157
100158
100159
100160
100161
100162
100163
100164
100165
100166
100167
100168
100169
100170
100171
100172
100173
100174
100175
100176
100177
100178
100179
100180
100181
100182
100183
100184
100185
100186
100187
100188
100189
100190
100191
100192
100193
100194
100195
100196
100197
100198
100199
100200
100201
100202
100203
100204
100205
100206
100207
100208
100209
100210
100211
100212
100213
100214
100215
100216
100217
100218
100219
100220
100221
100222
100223
100224
100225
100226
100227
100228
100229
100230
100231
100232
100233
100234
100235
100236
100237
100238
100239
100240
100241
100242
100243
100244
100245
100246
100247
100248
100249
100250
100251
100252
100253
100254
100255
100256
100257
100258
100259
100260
100261
100262
100263
100264
100265
100266
100267
100268
100269
100270
100271
100272
100273
100274
100275
100276
100277
100278
100279
100280
100281
100282
100283
100284
100285
100286
100287
100288
100289
100290
100291
100292
100293
100294
100295
100296
100297
100298
100299
100300
100301
100302
100303
100304
100305
100306
100307
100308
100309
100310
100311
100312
100313
100314
100315
100316
100317
100318
100319
100320
100321
100322
100323
100324
100325
100326
100327
100328
100329
100330
100331
100332
100333
100334
100335
100336
100337
100338
100339
100340
100341
100342
100343
100344
100345
100346
100347
100348
100349
100350
100351
100352
100353
100354
100355
100356
100357
100358
100359
100360
100361
100362
100363
100364
100365
100366
100367
100368
100369
100370
100371
100372
100373
100374
100375
100376
100377
100378
100379
100380
100381
100382
100383
100384
100385
100386
100387
100388
100389
100390
100391
100392
100393
100394
100395
100396
100397
100398
100399
100400
100401
100402
100403
100404
100405
100406
100407
100408
100409
100410
100411
100412
100413
100414
100415
100416
100417
100418
100419
100420
100421
100422
100423
100424
100425
100426
100427
100428
100429
100430
100431
100432
100433
100434
100435
100436
100437
100438
100439
100440
100441
100442
100443
100444
100445
100446
100447
100448
100449
100450
100451
100452
100453
100454
100455
100456
100457
100458
100459
100460
100461
100462
100463
100464
100465
100466
100467
100468
100469
100470
100471
100472
100473
100474
100475
100476
100477
100478
100479
100480
100481
100482
100483
100484
100485
100486
100487
100488
100489
100490
100491
100492
100493
100494
100495
100496
100497
100498
100499
100500
100501
100502
100503
100504
100505
100506
100507
100508
100509
100510
100511
100512
100513
100514
100515
100516
100517
100518
100519
100520
100521
100522
100523
100524
100525
100526
100527
100528
100529
100530
100531
100532
100533
100534
100535
100536
100537
100538
100539
100540
100541
100542
100543
100544
100545
100546
100547
100548
100549
100550
100551
100552
100553
100554
100555
100556
100557
100558
100559
100560
100561
100562
100563
100564
100565
100566
100567
100568
100569
100570
100571
100572
100573
100574
100575
100576
100577
100578
100579
100580
100581
100582
100583
100584
100585
100586
100587
100588
100589
100590
100591
100592
100593
100594
100595
100596
100597
100598
100599
100600
100601
100602
100603
100604
100605
100606
100607
100608
100609
100610
100611
100612
100613
100614
100615
100616
100617
100618
100619
100620
100621
100622
100623
100624
100625
100626
100627
100628
100629
100630
100631
100632
100633
100634
100635
100636
100637
100638
100639
100640
100641
100642
100643
100644
100645
100646
100647
100648
100649
100650
100651
100652
100653
100654
100655
100656
100657
100658
100659
100660
100661
100662
100663
100664
100665
100666
100667
100668
100669
100670
100671
100672
100673
100674
100675
100676
100677
100678
100679
100680
100681
100682
100683
100684
100685
100686
100687
100688
100689
100690
100691
100692
100693
100694
100695
100696
100697
100698
100699
100700
100701
100702
100703
100704
100705
100706
100707
100708<br

1 allegations;" and "rewrite[ing] the Complaint." *See, e.g.*, Plaintiff's Response, p. 5. If this is true,
 2 it is because of the confusing if not incomprehensible Complaint, which Plaintiff's Response does
 3 nothing to clarify. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a "short and plain
 4 statement of the claim showing that the pleader is entitled to relief" Fed.R.Civ.P. 8(a)(2). The
 5 Complaint falls short of this standard.¹ Accordingly, at a minimum the Court should dismiss the
 6 Complaint without prejudice and require an amended complaint that provides the defendants with
 7 fair notice of the causes of action.
 8

9 It appears that Knecht advances four (4) claims for relief: (1) a request for declaratory relief
 10 enjoining a pending nonjudicial foreclosure; (2) a finding that MERS violated RCW 40.16.030; (3)
 11 a finding that Moving Defendants violated the Washington Consumer Protect Act; and (4) a finding
 12 that Moving Defendants violated the Washington Criminal Profiteering Act². This brief addresses
 13 these matters.
 14

15 **B. There Is No Basis to Enjoin the Foreclosure.**

16 As an initial matter, Plaintiff's Response argues that the Complaint's request for declaratory
 17 relief was brought under the Washington Uniform Declaratory Judgment Act, RCW 7.24.010 *et*
 18 *seq.* ("UDJA") and should be considered under that statute. Moving Defendants do not dispute that
 19 Knecht may assert his claims under that statute, and this Court may apply the UDJA when deciding
 20 Knecht's request for declaratory relief relating to the pending foreclosure. *See, e.g.*, *Brodie v.*
 21 *Northwest Trustee Services, Inc.*, Slip Copy, 2012 WL 4468491 at *6 (E.D.Wash.,2012) (applying
 22

23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51

¹ This Court previously addressed a similar lawsuit from Knecht's counsel, referring to the plaintiffs' pleading in that case as "muddled." *Burkart v. Mortgage Electronic Registration Systems, Inc.*, Slip Copy, 2012 WL 4479577 at *2-3 (W.D.Wash., September 28, 2012) (quoting *Mickelson v. Chase Home Finance LLC* No. 11-1445MJP, (Dkt. #58) at 11 (Apr. 16, 2012 order granting motion to dismiss referring to counsel's "[s]hot gun-style pleadings)).

² The undersigned counsel acknowledges that Defendants' Motion to Dismiss [Dkt. 10] incorrectly states in the Introduction that the Washington Criminal Profiteering Act, RCW 9A.82.010, *et seq.*, does not include a private right of action, a point noted in Plaintiff's Response at p. 2. This introductory statement was intended to cite the other criminal statute under which Knecht is pursuing a private right of action, RCW 40.16.030, which in fact does not include a private right of act. While the introductory statement included an error, the substance of Defendants' Motion to Dismiss acknowledges the private right of action provision imbedded in the Criminal Profiteering Act and addresses that provision. *See* Defendants' Motion to Dismiss [Dkt. 10] at p. 17-18.

UDJA to complaint seeking a judicial declaration that the deed of trust no longer secured a promissory note).

For purposes of the arguments advanced by Moving Defendants, there are no material differences between the UDJA and the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Specifically, the UDJA, like the Declaratory Judgment Act, requires that the plaintiff show a “justiciable controversy.” *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). Also similar, Washington courts define a justiciable controversy under the UDJA as:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

Absent a “justiciable controversy,” a claim or issue is moot and must be dismissed. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993).

1. Plaintiff concedes that there is no justiciable controversy regarding MERS.

Plaintiff’s Response offers no reply to Moving Defendants’ argument that the Complaint fails to advance a justiciable controversy for declaratory relief against MERS. Instead, Plaintiff’s Response argues that it has a controversy with Deutsche Bank—the foreclosing party—and the “MERS system.” The “MERS system” is not a defendant; there is no justiciable controversy with the “MERS system;” and the Court cannot issue relief against “the MERS system.” Accordingly, all declaratory relief claims against MERS must be dismissed.

2. Plaintiff's Response lacks a coherent argument supporting grounds to enjoin the pending foreclosure sale.

At the heart of the Complaint is Knecht's effort to enjoining the pending nonjudicial foreclosure. Yet Plaintiff's Response lacks any clear analysis of the Washington Deed of Trust

1 Act. Nor does it identify factual assertions in the Complaint that support an injunction. At best,
 2 Knecht asks the Court to enjoin the foreclosure because the trustee lacks proof that beneficiary
 3 (Deutsche Bank) is the owner of the promissory note, as required by RCW 61.24.030(7)(a).
 4 Plaintiff's Response, p. 15.
 5

6 While trying to distance himself from the universally rejected "show me the note"
 7 argument, Knecht cannot help but center his claim on that faulty line of reasoning. For example, he
 8 argues that "[i]t is the beneficiary's job to prove that the it (sic.) meets the definition set forth in
 9 RCW 61.24.005(2)." Plaintiff's Response, p. 19. He likewise argues that "it is not Knecht who
 10 must prove who has ownership of the note; it is the beneficiary." *Id.*, p. 20. This is a "show me the
 11 note" argument. Knecht also tries to convert Washington's nonjudicial foreclosure process into one
 12 requiring judicial oversight. The Court should decline this offer.³
 13

14 As predicted in Defendants' Motion to Dismiss, Knecht wrongly argues that Deutsche Bank
 15 is not the beneficiary because, under the *Bain* decision, MERS lacked authority to execute the
 16 Assignment of Deed of Trust recording a transfer of Knecht's deed of trust to Deutsche Bank.
 17 However, *Bain* did not decide that issue; rather, the *Bain* court only decided whether MERS met
 18 the statutory definition of "beneficiary" such that it had authority to appoint a substitute trustee.
 19 *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). In this case,
 20 Deutsche Bank, not MERS, appointed the trustee. [Dkt. 2-1, p. 50] Further, it is Deutsche Bank
 21 pursuing foreclosure, not MERS. [*Id.*, pp. 47-48.] *Bain* does not help.
 22

23 More importantly, Knecht's reliance on the Assignment of Deed of Trust as "evidence" to
 24 support his argument that Deutsche Bank is not the beneficiary is also wrong because the recording
 25 of an Assignment of a Deed of Trust does not determine the beneficiary. Indeed, *Bain* instructs
 26 very clearly that the assignments and other public recordings are not what determine who the
 27

28 ³ If Knecht wants to assert that he has specific facts showing the Deutsche Bank is not the actual beneficiary,
 29 including that Deutsche Bank does not have possession of the note, he should make that assertion in compliance with
 30 Fed.R.Civ.P. 11.
 31

1 beneficiary is; rather, it is the entity that meets the statutory definition of “beneficiary” who is
 2 entitled to foreclose, regardless of what is in the public records. *See Bain*, 175 Wn.2d at 102-105.
 3 Therefore, to state a claim for relief disputing Deutsche Bank’s standing to foreclose as the
 4 beneficiary, Knecht must assert specific facts showing that Deutsche Bank does not meet the
 5 definition of “beneficiary” as defined under the Washington Deed of Trust Act. *See* Defendants’
 6 Motion to Dismiss [Dkt. 10], p. 14-15. Here, Knecht only challenges the Assignment of Mortgage.
 7 This is insufficient to survive a motion to dismiss.
 8

9 **C. MERS Did Not Violate RCW 40.16.030.**

10 Knecht requests a declaratory judgment that MERS violated RCW 40.16.030. As stated in
 11 Defendants’ Motion, the claim fails because (1) RCW 40.16.030 is a criminal statute without a
 12 private civil cause of action; (2) there is no implied private right of action; and (3) even if a private
 13 cause of action existed, the Complaint fails to allege a violation of RCW 40.16.030.
 14

15 Knecht agrees that RCW 40.16.030 does not contain a private right of action. *See*
 16 Plaintiff’s Response, pp. 10-12. Instead, Knecht argues that the statutory duty created under the
 17 law “can be the basis of tort duty” and that an implied right of action exists. These arguments fail.
 18 First, the Complaint does not assert a “tort” action against Moving Defendants relying on RCW
 19 40.16.030. Rather, the Complaint seeks a declaratory judgment that “MERS is guilty” of violating
 20 RCW 40.16.030. Complaint, p. 7. Second, Plaintiff’s Response makes no effort to analyze
 21 whether there is an implied private right of action, which includes a showing of legislative intent
 22 and that implying a private right of action is consistent with the statutory purpose. *See Bennett v.*
 23 *Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990).
 24

25 As explained in Defendant’s Motion to Dismiss, there is nothing in the legislative history or
 26 the statute suggesting that the legislature intended to imply a private right of action under RCW
 27 40.16.030. Further, the statute is clear that it criminalizes the recording of false or forged
 28 documents with public governmental agencies. Nothing in the statute suggests its purpose is to
 29
 30

1 protect individuals involved in a private transaction. Knecht, other than saying that Moving
 2 Defendant's position "is without merit," offers no legal authority or reasoned analysis to the
 3 contrary. *See Plaintiff's Response*, p. 12.
 4
 5

6 Further, even if a private cause of action exists, Plaintiff's Response fails to identify how
 7 the Complaint states a claim for relief under RCW 40.16.030. The Complaint fails to allege
 8 sufficient facts to suggest that MERS knowingly offered or procured a false or forged document.
 9 RCW 40.16.030. Plaintiff's Response appears to argue that, after the Washington Supreme Court's
 10 decision in *Bain*, every document recorded by MERS is tantamount to a violation of RCW
 11 40.16.030. This is irrational, as is the statement in Plaintiff's Response that "defendants admit they
 12 have violated the duty imposed by this criminal statute under the rule of law set forth in *Bain*...."
 13 Plaintiff's Response, p. 12. Culling through the *ad hoc* references to the *Bain* decision, Plaintiff's
 14 Response offers nothing from the Complaint supporting a claim for relief under RCW 40.16.030.
 15
 16

17 **D. Plaintiff's Response Fails to Identify Allegations in the Complaint Which State a**
 18 **Claim for Relief Under the Washington Consumer Protection Act.**

19 Plaintiff's Response argues that the Moving Defendants violated the Washington Consumer
 20 Protection Act, RCW 19.86.010, *et seq.* ("WCPA") because Knecht "is being subject to an illegal
 21 nonjudicial foreclosure under the MERS system while he is being dual tracked by a MER's server."
 22 Plaintiff's Response, p. 22. Apparently, Knecht basis his WCPA claim entirely on the original
 23 deed of trust's inclusion of MERS and undefined allegations of "robo-signing."
 24
 25

26 The Complaint and the arguments advanced in Plaintiff's Response show that the WCPA
 27 claim fails for the reasons stated in Defendants' Motion to Dismiss. In particular, Knecht offers no
 28 meaningful explanation of how he has been injured by any allegedly deceptive practice. He does
 29 not dispute that he is obligated to repay the mortgage loan and that he signed a deed of trust
 30 intending to transfer a security interest in his residence. He does not suggest that MERS, AHMSI
 31 or Deutsche Bank has done anything to harm him. Indeed, any harm is the result of his failure to
 32 pay the his mortgage, which breached the promissory note and deed of trust.
 33
 34

With respect to his “robo-signing” allegations directed at AHMSI⁴, the Complaint does not show how Knecht was harmed by the alleged practice in connection with the assignment documents he contends are false. Knecht was not a party to the Assignment of Mortgage or Appointment of Substitute Trustee recordings. *See* Compliant, Exs. 3 & 4 [Dkt. 2-1, pp. 44-53]. As some courts have held, borrowers lack standing to challenge the validity of mortgage assignments or other mortgage related documents to which they are not a party. *See Neal v. Bank of America, N.A.* Slip Copy, 2012 WL 3638762 at *4 (D.Ariz.,2012) (plaintiff lacked standing to challenge the validity of the mortgage assignment or substitution of trustee); *In re Mortg. Elect. Registration Sys. (MERS) Litig.*, Slip Copy, 2011 WL 4550189, at *5 (plaintiffs lack standing to assert robo-signing allegations, because “as third-party borrowers, [they] are uninvolved and unaffected by the alleged [a]ssignments, and do not possess standing to assert a claim based on such”).

Finally, Knecht’s blind reliance on *Bain* to support his WCPA claim is misplaced because the facts in that case were materially different. The *Bain* court held that while MERS role in the deed of trust is not *per se* deceptive, “characterizing MERS as the beneficiary has the capacity to deceive...” *Bain*, 175 Wn.2d at 116. However, in this case, Deutsche Bank, not MERS initiated foreclosure. *See* Complaint, Ex. 5 [Dkt. 2-1, pp. 50-53]. Similarly, it was Deutsche Bank, not MERS that appointed Fidelity as the substitute trustee. *Id.*, Ex. 4 [Dkt. 2-1, p 47]. Accordingly, the holding in *Bain* relating to the foreclosure activities of MERS is not relevant. In this case, MERS did nothing to deceive Knecht.

⁴ The Complaint seeks declaratory relief that AHMSI has made false statements. Complaint, p. 7-8. As argued in its Motion to Dismiss, this type of request is not properly brought as a claim for declaratory relief. Moving Defendants presume that “false statement” allegations against AHMSI are intended to predicate Knecht’s WCPA cause of action, and therefore they address the allegations against AHMSI in that section. To the extent Knecht is attempting to assert a separate fraud claim against AHMSI, it fails to satisfy Rule 9(b)’s heightened pleading standard.

1 **E. Plaintiff's Washington Criminal Profiteering Act Claim is Without Merit.**

2
3 Plaintiff's Response appears to argue that the Moving Defendants violated the Washington
4 Criminal Profiteering Act, Chapter 9A.82 RCW, because Deutsche Bank continued foreclosure
5 efforts after the *Bain* decision. Plaintiff's Response, p. 23. He argues “[k]eeping up the enterprise
6 set up by MERS and its associated business partners where it is unlawful to do so constitutes
7 Criminal Profiteering in violation of RCW CH. 9A.82.” *Id.* Further, Knecht boldly claims that the
8 real estate recordings attached to the Complaint “are evidence of the predicate act of extortion.” *Id.*
9
10
11
12
13
14

15 Knecht's argument is hollow, and makes no meaningful effort to address the required
16 elements under the Washington Criminal Profiteering Act. That act requires proof that the
17 defendant engaged in (i) activity that violated a statute identified in the act; or (ii) “criminal
18 profiteering that is part of a pattern of criminal profiteering activity” and (iii) proof that the plaintiff
19 sustained injury; and (iv) proof that the defendant's violation caused such injury. Knecht's
20 reference to exhibits to the Complaint and cavalier—if not irresponsible—argument that those
21 exhibits are “evidence of extortion” fail to state a claim for relief.
22
23
24
25
26
27
28

29 Knecht's argument that his Criminal Profiteering Act claim should survive because he is
30 alleging extortion and forgery is nothing more than the type of conclusory allegations of law and
31 unwarranted inferences that will not defeat a motion to dismiss. *See Vasquez v. L.A. County*, 487
32 F.3d 1246, 1249 (9th Cir. 2007). In support of these very serious allegations of criminal
33 wrongdoing, Knecht relies solely on Deutsche Bank's Appointment of Successor Trustee and the
34 Notice of Trustee's Sale, which are Exhibits 4-9 to the Complaint [Dkt. 2-1, pp. 43-53]. Knecht
35 claims that he “does not have to allege predict acts [of criminal profiteering], because they appear
36 as part of his complaint.” Plaintiff's Response, p. 23. He is wrong.
37
38
39
40
41
42
43
44

45 These documents do not prove or even remotely suggest that Moving Defendants
46 committed a crime. Extortion requires, *inter alia*, proof of a threat of physical damage to property
47 of a person. RCW 9A.04.110(28)(b). Forgery requires proof that a person, with intent to defraud
48
49
50
51

1 or injure, “falsely makes, completes or alters a written instrument....” RCW 9A.06.020. The
 2 documents attached to the Complaint do not prove these crimes.
 3
 4

5 Finally, the Complaint and Plaintiff’s Response fail to identify any injury that Knecht
 6 sustained as a result of the purported violations of the Criminal Profiteering Act. Indeed, the only
 7 purported “injury” alleged in the Complaint is the pending foreclosure. However, Knecht does not
 8 and cannot dispute that the foreclosure is the result of his failure to make required mortgage
 9 payments, and not any action taken by Moving Defendants. For this additional reason, the
 10 Criminal Profiteering Act claim must be dismissed.
 11
 12

13 * * *

14 For the foregoing reasons and those stated in its Motion to Dismiss, Moving Defendants
 15 respectfully request that the Court dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), with
 16 prejudice, on the grounds that the Complaint fails to state a claim upon which relief may be
 17 granted.
 18
 19

20 DATED this 26th day of October, 2012.
 21
 22

23 By: /s Frederick B. Rivera. WSBA #23008
 24 Frederick B. Rivera, WSBA #23008
 25 **Perkins Coie LLP**
 26 1201 Third Avenue, Suite 4900
 27 Seattle, WA 98101-3099
 28 Telephone: 206.359.8000
 29 Facsimile: 206.359.9000
 30 Email: FRivera@perkinscoie.com
 31
 32

33 Attorneys for Defendants Mortgage Electronic
 34 Registration Systems Inc.; Deutsche Bank
 35 National Trust Co., as Trustee for GSR
 36 Mortgage Loan Trust 2006-0A1, Mortgage
 37 Pass-Through Certificates Series 2006-0A1;
 38 and American Home Mortgage Servicing Inc.
 39 (now known as Homeward Residential Inc.)
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51

DEFENDANTS' REPLY IN SUPPORT OF
 MOTION TO DISMISS
 (NO. 2:12-CV-1575 RAJ) – 9

71045-0121/LEGAL24995208.1

Perkins Coie LLP
 1201 Third Avenue, Suite 4800
 Seattle, WA 98101-3099
 Phone: 206.359.8000
 Fax: 206.359.9000

1

2

3

4

5

6

7

8

CERTIFICATE OF SERVICE

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

On October 26, 2012, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

DEFENDANTS' MOTION TO DISMISS

Scott E. Stafne
Stafne Law Firm
239 N. Olympia Avenue
Arlington, WA 98223

Attorney for Plaintiff

Via hand delivery
 Via U.S. Mail, 1st Class,
Postage Prepaid
 Via Overnight Delivery
 Via Facsimile
 Via E-filing

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, October 26, 2012.

By: s/ Frederick B. Rivera
Frederick B. Rivera, WSBA #23008
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Email: FRivera@perkinscoie.com

Attorneys for Defendants
Mortgage Electronic Registration Systems Inc.;
Deutsche Bank National Trust Co., as Trustee
for GSR Mortgage Loan Trust 2006-0A1,
Mortgage Pass-Through Certificates Series
2006-0A1; and American Home Mortgage
Servicing Inc. (now known as Homeward
Residential Inc.)

CERTIFICATE OF SERVICE – 1

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000